No. 22507

In the

United States Court of Appeals

For the Ninth Circuit

R. ANTHONY DUBAY,
Appellant,

vs.

EVERETTE H. WILLIAMS,
Appellee.

EVERETTE H. WILLIAMS,
Appellant,

vs.

ROSE CITY DEVELOPMENT CO., INC.,
Appellee.

ROBERT J. DAVIS,
Appellant,

vs.

EVERETTE H. WILLIAMS,
Appellee.

Brief of National Commercial Finance Conference, Inc., Amicus Curiae

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AUTHORITIES CITED

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Brief of

National Commercial Finance Conference, Inc., Amicus Curiae, in Support of the Position of Appellee Rose City Development Company, Inc.

INTEREST OF AMICUS CURIAE

This brief is respectfully filed upon the written consent of all parties to the appeal, pursuant to Rule 18(9)(a) of the Rules of this Court. Such written consent is submitted herewith.

The Amicus Curiae is a non-profit membership corporation. It is the national trade association for the commercial finance and factoring industry, having well over one hundred members of varying size, operating on a national, regional, or local scale. They offer secured credit to manufacturers, wholesalers, and retailers whose products and services embrace the entire economic range. While these borrowers are both large and small, the bulk of them are properly characterized as "small business".

The importance to small business of such financing and factoring facilities has long been recognized. Ten years ago, the Board of Governors of the Federal Reserve System reported to the Congress as follows ("Financing Small Business", Report to the Committees on Banking and Currency and the Select Committees on Small Business, April 11, 1958, Volume 2, Survey IV, pp. 1-3):

> "Commercial finance companies and factors play a significant role in the financing of small businesses in manufacturing and wholesale trade. Commercial financing and factoring are particularly significant in a study of small business financing because credit is made available to small businesses that do not have access to bank credit or to the markets for equity and long-term debt funds."

Statistics compiled by the Amicus Curiae from published financial reports, and from figures supplied by its own members, indicate that the Amicus Curiae's industry transacts an annual volume of secured financing in excess of $26 bil-

lion. A substantial additional amount is transacted by commercial banks and others. The largest single segment of such business consists of the financing or factoring of accounts receivable, which is the classic form of secured financing.

STATEMENT OF THE CASE

The relevant facts and the applicable law are fully presented in the briefs of the parties, and need not be repeated. The only matter with which the Amicus Curiae is here concerned is the practical importance of the case because of its impact upon accounts receivable financing and factoring and the cost thereof.

The Amicus Curiae respectfully submits that the decision below, insofar as it upheld the claim of appellee Rose City Development Company, Inc. to the bankrupt's accounts receivable, should be affirmed.

ARGUMENT

The usefulness to a small businessman of financing upon his accounts receivable obviously depends in large measure on the cost.

Prior to the Uniform Commercial Code, such financing could not be done on a legally sound basis unless the financing institution insisted on strict dominion over the accounts receivable and their proceeds. This meant that each individual account receivable had to be assigned in writing; that the checks received on the assigned accounts had to be delivered to or deposited to the credit of the financing institution; and that the latter had to control and police the transactions by maintaining, in effect, a duplicate accounts receivable ledger in which it recorded all shipments, assignments, merchandise returns, payments, and other credits. All these things had to be done on a continuous

daily basis, because the pre-Code law required them to be done as a legal prerequisite to the perfection of the assignee's rights. This was the "dominion" rule as originally announced in *Benedict v. Ratner,* 268 U.S. 353 (1925). Necessarily, the bookkeeping and other overhead expense of such detailed procedures was reflected in the cost of financing.

Under the Code, there is no need for specific assignments of the individual accounts, because the security agreement itself may constitute the assignment [Section 9-204(3)]; and there is no need for the strict handling of account-debtors' checks or for daily advances and repayments, because the dominion rule is abolished by the Code [Section 9-205]. As a result, the overhead cost of the operation can in many cases be substantially lower than heretofore.

Since the Code has been enacted in 49 of the 50 States, as well as by the Congress itself (for the District of Columbia), it is obvious that the streamlined and less expensive procedures provided by the Code for accounts receivable financing are consonant with our State and Federal public policy. The Amicus Curiae is aware that many of its members, as well as other institutions engaged in secured financing, employ the Code techniques in their handling of loans secured by accounts receivable and inventory collateral, to the benefit of themselves and their borrowers.

In the instant case, the Referee conceded that the claim of Rose City to the accounts receivable on hand at the date of bankruptcy would probably have been unassailable if Rose City had utilized the daily advances and repayments procedure which was generally employed prior to the advent of the Uniform Commercial Code [Transcript of Record, Volume One, pp. 36-37]; but he also acknowledged that such procedures were cumbersome [Transcript of Record,

Volume One, p. 37, line 13]. In the District Court, Judge Solomon made the same point, noting that the "old method was both expensive and cumbersome and necessarily increased the cost of money" [271 Fed. Supp. 395, at p. 400].

Affirmance by this Court with respect to Rose City's claim would protect the flexibility and minimize the cost of accounts receivable financing, just as is contemplated by the Code. Reversal by this Court, on the other hand, would force secured parties to revert to the archaic pre-Code procedures, and the cost of such financing would inevitably be increased. Such a result would be regarded by the Amicus Curiae as adverse to the national interest, in that it would constitute an unjustified impediment to the vital flow of secured credit into the small businessmen who depend upon it for their day-to-day cash requirements.

CONCLUSION

The secured transactions between the bankrupt and Rose City were duly perfected in the manner prescribed by the Uniform Commercial Code, and the present attack upon Rose City's claim to the assigned accounts receivable should fail. In the factual context of this case, there is no legal or moral conflict between the provisions of the Code and the provisions of the Bankruptcy Act, because Rose City's collateral position was not improperly improved, at the expense of any other creditor, during the four-month period preceding bankruptcy.

Most importantly, a decision adverse to Rose City would have a serious adverse effect upon the integrity and availability of modern accounts receivable financing and factoring, because it would increase the risk and cost of administering the transactions and resultantly the cost thereof to the small businessmen who require such financial services.

The decision below should be affirmed as to appellee Rose City Development Company, Inc.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney.